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"CORRUPTION FROM A REGULATORY PERSPECTIVE"
MARIA DE BENEDETTO
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BOOK REVIEW

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Maria de Benedetto explains what her book is about in its very first sentence[2].

Its central idea, she writes, '*is that administrative corruption, loke other kinds of illicit behaviour, presupposes both the existence and the ineffectiveness of rules, and it follows that a regulatory perspective may therefore help in preventing both corruption and infringements'*.

The project of the book is therefore to examine the problem of corruption through the lens of regulatory theory. It is original and the reading of the book shows that it is quite relevant.

The theory of regulation (of which, in my opinion, the most efficient presentation can be found in the classic book by Anthony Ogus, '*Regulation: Legal Form and Economic Theory'*, Hart, 2003) is, as is well known, fundamentally a theory of public intervention, an

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[2] M. DE BENEDETTO, Corruption from a Regulatory Perspective, Hart Publishing, UK, 2021.

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analysis of the reasons that justify it, of the forms that it takes, and of the way in which it produces or does not produce effects.

A significant part of regulation theory is indeed about legal rules, about what triggers their emergence, about their formulation, and the mechanisms that condition their application, including the degree of flexibility that it entails (on this subject there is a no less classic article by Julia Black: Regulatory Conversations, Journal of Law and Society, March 2002).

It is immediately clear what this approach can contribute to the analysis of corruption and the means to fight it. In essence, corruption is a game with the rules, and even doubly so in general. Corruption is both a game with the rules that seek to prevent and sanction corruption, and a game with the rules that frame what the briber tries to get from the bribed. A person who bribes a public official in order to obtain a public contract is playing both with the rules that seek to prevent and sanction corruption in public procurement and with the rules that govern the award of public contracts.

Based on this theory, Maria de Benedetto succeeds in demonstrating very effectively what corruption owes to the weakness of the rules, which may be due to their excessive complexity, to shortcomings in the mechanisms for monitoring compliance, as well as to those that may affect the sanctioning mechanisms. It also makes several recommendations, which are presented in the last chapter (*'Combating Corruption via Regulation and Controls: Which Formula?'*).

The book is particularly interesting, and not only for its analysis of the basic equation: to limit corruption, one must make good rules and monitor them well. For, beneath this basic equation, in fact, lie various aspects of complexity, which the book encounters on its way.

One is that corruption can only be effectively combated with a combination of good rules and good institutions. This requirement naturally concerns first and foremost the

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specialised institutions responsible for preventing and punishing corruption (they are analyzed in Chapter 2 of the book), but it also concerns more broadly the quality of public institutions in general and of the people - elected officials, civil servants - who run them. This is an aspect of the issue which, however, is less a matter of regulatory theory than one of political science and public management.

The second element of complexity is that, while bribery is an exercise in choreography with rules, not all rules play the same role in the ballet. Of paramount importance are those surrounding the sanctions for corruption, especially criminal sanctions. There is probably no legal system in which corruption is not sanctioned at all. And the level of corruption in a given context is a function of a classical equation: corruption occurs when the expected gain of the briber (G) exceeds the product of the sanction's weigh (S) by the probability of its implementation (P): so, where $G > S \times P$.

But the choreography is even more complicated, because, in all corruption arrangements, there are two basic protagonists: the briber and the bribed. If one of them is prosecuted and the corruption pact is demonstrated, then the other one will normally not get away with the sanction. Therefore, every corruption arrangement potentially contains a prisoner dilemma in the sense of game theory.

A third complement to be added to the pure regulatory approach – the book touches upon it on page 42- is related to what causes the corruption to happen in the public sphere. One essential factor, here, is the fact that public institutions are, in a vast amount of situations, in position to distribute scarce resources (two recommended readings on this: Paul Adriaanse and al. , eds, '*Scarcity and the State, Intersentia'*, 2016 – Luis Arroyo and Dolores Utrilla, eds., '*La administracion de la escasez'*, Marcial Pons, 2015); funds, contracts, permissions, and so on. This is probably particularly true in the contemporary era, because of the flourishing of privatizations and of the various public-private partnerships (see e.g. Irma E. Sandoval-Ballesteros, *'From "Institutional" to "Structural" Corruption: Rethinking Accountability in a World of Public-Private Partnerships'*, Harvard University, Edmond J. Safra Working Papers, No. 33, 2013: http://www.ethics.harvard.edu/lab).

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In that perspective, some rules appear as having a particular importance in limiting corruption: the ones which govern the granting of the various scarce resources the administration is entitled to allocate. Some of these rules are procedural, they regulate the administrative processes through which the allocation is decided: here, the transparency requirements are of a special importance. Others are material, they frame the legal criteria according to which the allocating decision must be made: there, the issue of discretion is crucial.

A fourth element of complexity – considered in the book around the pages 29 and 92, notably- is the fact that the frequency of corruption in one system is largely function of the level of the trust citizens have in public institutions. And in the production of this trust, good regulation has a limited role: it has certainly one, in the sense that a system in which rules are poorly designed, not well respected, and so on, will normally not attract a high degree of trust, but the latter depends on other conditions, of a social, cultural, and political nature. Most of us are probably confident in the fact that democracy is the best political protection against corruption, and it is probably true. But, as Tocqueville, for example, explained, democracies have also their share of vulnerability to it (in "De la démocratie en Amérique": see Pierre Manent, Tocqueville et la nature de la démocratie, Gallimard, 2006).

Lastly, as Maria de Benedetto notices (around pages 116 and 136), there are two adjacent issues to the one of corruption which are difficult to deal with, whose regulation is not easy at all: it is lobbying, and conflicts of interest. They are not an internal aspect of the corruption problem since both can perfectly exist without being associated to any corrupt practice. But they also often are avenues to corruption. And they are always difficult to regulate, because their adequate level of limitation or prohibition is always difficult to determine (See, for example, Susan Rose-Ackerman, Corruption and conflicts of interest, in Jean-Bernard Auby, Emmanuel Breen and Thomas Perroud, eds., Corruption and Conflicts of Interest: A Comparative Law Approach, Edward Elgar, 2014, p.3).

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While keeping the strong line of the regulatory perspective, Maria de Benedetto is aware of all this complexity, and this makes her book all the more penetrating and effective.